INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	11

CITATIONS

Cases:

Duckworth v. *Watsonville Water & Light Co.*, 158 Cal. 206, 110 Pac. 927	8
Lindblom v. *Round Valley Water Co.*, 178 Cal. 450, 173 Pac. 994	7, 8
Smith v. *Hawkins*, 110 Cal. 127, 42 Pac. 453	9
Turner v. *East Side Canal & Irrigation Co.*, 169 Cal. 652, 147 Pac. 579	8
United States v. *Gerlach Live Stock Company*, Nos. 4-9, October Term, 1949	2, 3, 6, 7, 10

Statutes:

Rivers and Harbors Act of August 26, 1937, Sec. 2, 50 Stat. 844	2
Reclamation Act of June 17, 1902, 32 Stat. 388	3
Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038	3
Act of July 30, 1941, 55 Stat. 612	3
Act of December 22, 1944, 58 Stat. 887	3
California, General Laws, Act 9091, Sec. 20a (Stats. 1917, c. 554, sec. 2, p. 748)	3
California Water Code (Deering), sec. 1242	9

Miscellaneous:

2 Kinney, *Irrigation and Water Rights* (2d Ed.)	9
Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, sec. 309	6

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

EAST SIDE CANAL & IRRIGATION COMPANY AND STEVINSON WATER DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on December 5, 1949, by the United States Court of Claims.

OPINIONS BELOW

The first opinion of the Court of Claims in this case (R. 34-40) is reported in 111 Ct. Cls. 124. Its final opinion (R. 41-42) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1949 (R. 43). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims was warranted in holding, contrary to an express congressional declaration, that the construction of the Friant Dam, which is an integral part of the Central Valley project in California, was not authorized for the purpose of aiding navigation and commerce.

2. Whether under the law of appropriation of waters generally prevailing in the western states, one may acquire, as against the United States, a vested property right to divert the water of a navigable river.

3. Whether holding of water as a reserve supply for use in the event other supplies fail constitutes beneficial use of water within the meaning of California law.

4. Whether Congress has assumed an obligation, which would not otherwise exist, to pay respondents for loss of such reserve right by interference with the flow of the navigable stream.

5. Whether the Court of Claims was correct in holding that there was a taking of respondents' water rights by October 20, 1941.

STATUTES INVOLVED

Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, is set out at pages 4-6 of the Brief for the United States in *United States* v. *Gerlach Live Stock Company, etc.*, Nos. 4-9, October Term, 1949. The relevant

provisions of the Reclamation Act of June 17, 1902, 32 Stat. 388, the Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, the Act of July 30, 1941, 55 Stat. 612, the Act of December 22, 1944, 58 Stat. 887, and various appropriation acts are set out in the appendix to the Brief for the United States in *United States* v. *Gerlach Live Stock Company, etc.,* Nos. 4-9, October Term, 1949. Section 20a of the Act 9091 of the General Laws of California (Stats. 1917, c. 554, sec. 2, p. 748), provides:

> *Reversion of water on non-user for three years.*—When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

STATEMENT

This is a companion case to *United States* v. *Gerlach Live Stock Company, etc.,* Nos. 4-9, October Term, 1949 (hereinafter referred to as the *Gerlach* case). It was instituted December 11, 1944, to recover for the alleged taking of an appropriative water right by the erection of Friant Dam on the San Joaquin River, California. Respondents asserted a right to divert a specified quantity of water from the San Joaquin River and alleged that on October 20, 1941, the United States took such

rights (R. 1-7).[1] On April 5, 1948, the Court of Claims held that there had been a taking of respondents' property, following its decision in the *Gerlach* case (R. 35). Its findings relating to the questions thus decided are substantially the same as those made in the *Gerlach* case (Fdgs. 4, 5, 34-49, R. 8-9, 24-34).

The court found that by construction of a dam and canal, respondents and their predecessors had appropriated and diverted 245⅞ cubic feet per second whenever 281 cubic feet per second or more was available, and ⅞ of all the water of the river flowing at the head of the canal when less than 281 cubic feet per second was available, and had used such water for irrigation, watering livestock, and domestic uses (Fdg. 6, R. 9-10). There was water in the river available to respondents only during times of spring high water, usually during April, May and June (Fdg. 18, R. 16-17).

However, the court also found that respondents have not, in fact, used water from the San Joaquin River for several years, except to hold some of it in reserve (Fdg. 32, R. 24). By contract with the Merced Irrigation District embodied in a court decree, respondents are entitled to receive 24,000 acre feet annually of Merced River water (Fdgs. 20-21, R. 17-19). Based upon detailed figures for the years 1935-1941 (the amounts for prior years

[1] The two respondents have consented that any award may be made jointly in their favor (R. 41), and the nature of their separate rights is not presently material.

not having been satisfactorily shown), the court found that the Merced water received "has been greatly in excess of the 24,000 acre-feet per year required by the decree described in finding 20, as well as being greatly in excess of the amount of water delivered for beneficial use by the canal" (Fdg. 31, R. 23). The court further found that diversion by the Merced Irrigation District of the excess over 24,000 acre feet was physically possible and not economically unfeasible, but that "There are no present plans for such diversion" (Fdg. 31, R. 23).

The court concluded that under the California statute quoted above, respondents had by non-user forfeited the water right claimed by them (R. 38). It ruled, however, that holding water in reserve in the event that the excess Merced water should not be available did constitute beneficial use under the California statute and that the right to so hold the water had been taken by erection of Friant Dam (R. 38-39). The court found that if the excess water had not been delivered, respondents would have used San Joaquin water in an average amount of 200 acre feet in April, 827 acre feet in May, and 1,285 acre feet in June (Fdg. 31, R. 23), and that, based on the figures for the period 1935-1941, the maximum amount which might be needed to supply the deficiency was 1,189 acre feet in April, 1,797 acre feet in May and 3,588 acre feet in June. The court concluded that respondents had a right to hold these amounts in reserve (R. 39-40). The

case was remanded to the commissioner for the purpose of taking proof as to the value of such right (R. 40).

Recognizing that it was "quite unlikely that the Merced Irrigation District will ever release less water than plaintiffs need", the court, on December 5, 1949, nevertheless concluded that the right to hold the water in reserve against this "remote contingency" had a value of $5,000 and judgment was entered for this amount (R. 42-43).

REASONS FOR GRANTING THE WRIT

The court below recognized (R. 35) that the basic questions presented by this case are the same as those involved in the *Gerlach* case. In view of the pendency before this Court of the *Gerlach* case, review of the judgment of the Court of Claims in this case is plainly appropriate. See Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States,* sec. 309, and cases cited. And because of that fact too, the Government deems it necessary to do no more than outline the problems presented by this case, except where a question presented on this record, while related to those involved in *Gerlach,* is nevertheless not directly involved there.

1. In the Government's main brief (pp. 23-39) and supplemental brief (pp. 48-51) in the *Gerlach* case, we have pointed out the reason why we believe the Court of Claims erred in holding that Friant Dam was not erected in exercise of the authority of the United States over navigable

streams. This contention applies with equal force to the instant case.

2. In the *Gerlach* case we also urged that the respondents there, as owners of land riparian to a navigable river, do not own the flowing waters as against the United States (*Gerlach* main brief, pp. 39-48, supplemental brief 51-55). The position of respondents in the instant case differs from that of the respondents in the *Gerlach* cases in that here the alleged right is based upon the appropriation doctrine rather than the doctrine of riparian rights. However, as pointed out in the *Gerlach* briefs (main brief, p. 45, supplemental brief, p. 51), the question is, we believe, the same whether riparian or appropriative rights are concerned.

3. An additional question is presented whether the Court of Claims was correct in ruling that the holding of water sufficient to fill respondents' needs if the Merced River supply were reduced constituted beneficial use.

In *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450, 173 Pac. 994, the court stated: "Storage of water in a reservoir is not in itself a beneficial use. It is a mere means to the end of applying the water to such use. (Kinney on Irrigation, 2d ed., p. 1480.) The defendant's prescriptive rights do not extend to the impounding of water for the mere purpose of holding it in storage." It would seem to be equally clear that holding water as a reserve in case other

supplies fail is not beneficial use, particularly when, as the court recognized in its second opinion (R. 42), "it is quite unlikely that plaintiffs will ever have any use for this water." In *Turner* v. *East Side Canal & Irrigation Co.*, 169 Cal. 652, 147 Pac. 579, the court rejected a claim to a right to divert more than 281 c.s.f. for the very canal here involved, saying:

> There is no merit in the argument that when a person appropriates water to a public use he not only begins his adverse possession of the water he actually takes and puts to such use, but that he also at once institutes an effectual adverse claim to all that he in good faith intends to take or use in the future. The taking of water into a canal and allowing it to run to waste in the expectation that customers may be found who will use it at some future time does not constitute a present beneficial use of the wasted water, so as to initiate the period of prescription therefor.

A fortiori, the taking of San Joaquin water to be used only if the "remote contingency" of failure of the Merced water supply occurred is not present beneficial use. Recognizing that the decided cases did not support its view,[2] the Court of Claims said (R. 39): "At any rate, the California courts not

[2] In addition to the *Lindblom* case, the court cited *Duckworth* v. *Watsonville Water & Light Co.*, 158 Cal. 206, 110 Pac. 927 (R. 39). In that case, the company claimed it had a right not only to 40 inches which had been diverted but also to an additional amount as a reserve in the event a pipe line failed. The court replied that the only diversion claimed was 40

having held to the contrary, we now hold that the maintenance of this reserve supply was a beneficial use of the water within the meaning of the quoted section from the laws of California." But the decision is inconsistent in principle with the *Turner* case and, in fact, the Court of Claims' decision would seem to be contradictory to the fundamental purpose of the appropriation doctrine and of the forfeiture statute which, as the court said in *Smith* v. *Hawkins,* 110 Cal. 122, 127, 42 Pac. 453, and repeated in the *Lindblom* case:

> Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose.

Cf. 2 Kinney, *Irrigation and Water Rights* (2d ed.), pp. 1207-1209. See also California Water Code (Deering), sec. 1242, providing that the storage of water underground constitutes beneficial use "if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made."

4. Presumably, as in the *Gerlach* case, it will be argued in support of the judgment that Congress

---

inches and disposed of the case upon another ground. This decision does not, therefore, tend to support the view of the Court of Claims here.

has directed the payment of compensation to respondents. This matter has been thoroughly examined in the Government's main brief (pp. 59-72), reply brief (pp. 3-11), and supplemental brief (pp. 8-48). In that connection, it was pointed out that, as stated in the briefs filed by certain claimants and various states as *amici curiae*, the problem is the same whether riparian or appropriative rights are concerned (supplemental brief, p. 26). It should be noted that the right here asserted is not to make any present use of San Joaquin water, but is simply to have it held as a reserve for the remote contingency that Merced water should become unavailable.

5. The taking of respondents' property in this case was held to have occurred on October 20, 1941, and interest was awarded from that date (R. 43). In view of the nature of the property right held to have been taken, it is difficult to determine the date of such taking. However, it would seem that such taking could not occur prior to the time water had been diverted from the river by the Government to such an extent that there remained an amount insufficient to satisfy respondents' right. (See Government's main brief in the *Gerlach* case, pp. 74-80.)

CONCLUSION

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 875810 818

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 5 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 647

UNITED STATES OF AMERICA,
Petitioner,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY and STEVINSON WATER DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

EDWARD F. TREADWELL,
Mills Building, San Francisco 4, California,
Attorney for Respondents.

Subject Index

I. Page

Statement as to jurisdiction, etc. 1

II.

Effect of granting writs in United States v. Gerlach Live Stock Company, etc., Nos. 4-9, October Term, 1949..... 2

III.

Water in question was not abandoned 2

Table of Authorities Cited

Page

Buffalo County v. Phelps County, 261 N.W. 360, 129 Neb. 268 4

Chesapeake & Ohio R.R. Co. v. Com., 84 S.W. 566, 119 Ky. 519 5

Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 210, 110 Pac. 927 6

Howell v. Lamberson, 231 S.W. 872, 149 Ark. 183..... 5

Lindblom v. Round Valley Water Co., 178 Cal. 450, 457, 173 Pac. 994 6

Meridian Ltd. v. San Francisco, 13 C. (2d) 424, 449, 90 P. (2d) 537 6

Muenster v. Tremont Nat. Bank, 49 S.W. 362, 363, 92 Tex. 402 4

Rillito Canal Co. v. Schmidt, 89 Pac. 523, 525, 11 Ariz. 49 4

Stallings v. Thomas, 18 S.W. 184, 55 Ark. 326 4

Tulare Dist. v. Lindsay-Strathmore Dist., 3 C. (2d) 489, 547, 45 P. (2d) 1041 6

United States v. Gerlach Live Stock Company, etc., Nos. 4-9, October Term, 1949 2

Walker v. Sheffield Steel Corporation, 27 S.W. (2d) 44, 48, 224 Mo. App. 849 5

Worthington Pump & Machinery Co. v. City of Cudahy, 195 N.W. 717, 182 Wis. 8 5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 647

UNITED STATES OF AMERICA,
Petitioner,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY and STEVINSON WATER DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents oppose the Petition for a Writ of Certiorari in the above-entitled action on the grounds set forth herein:

I.

STATEMENT AS TO JURISDICTION, ETC.

The Petition adequately sets forth the date of the judgment, the opinions of the Court of Claims, the basis of jurisdiction, and the questions involved.

II.

EFFECT OF GRANTING WRITS IN UNITED STATES v. GERLACH LIVE STOCK COMPANY, ETC., NOS. 4-9, OCTOBER TERM, 1949.

The Petitioner claims that the writ should be granted because writs have heretofore been granted in *United States v. Gerlach Live Stock Company, etc.*, Nos. 4-9, October Term, 1949. Those cases, however, have already been argued and are now set down for reargument on March 28, 1950, and they will probably be decided before this Court passes on this application. If the judgments in those cases are affirmed, there would be no point in granting a writ in this case. If, on the other hand, the judgments in those cases should be reversed, it might be proper to grant the writ in this case. Petitioner has not attempted to reargue the questions involved in the *Gerlach* case, and we do not deem it necessary that we should do so, as those questions are fully argued orally and in the briefs in those cases.

III.

WATER IN QUESTION WAS NOT ABANDONED.

The correctness of the ruling of the Court of Claims that respondents had not abandoned the water as to which the Court of Claims in its judgment herein awarded compensation constitutes no basis for granting the writ here applied for.

The facts are that by appropriation, diversion and use, the East Side Canal & Irrigation Company had

become the owner of 245⅞ cubic feet of water per second of the San Joaquin River (R. p. 10). It was likewise the owner of a dam across the River and a canal for the diversion of this water (R. pp. 9-10).

The Canal Company operated at all times as a public utility subject to the control of the Railroad Commission of the State of California (R. pp. 7-8). During all of the times here involved the water of the San Joaquin River, which is here involved, was actually diverted from the River into the canal and, at large expense, the canal was kept in repair in order that the water might be carried down the canal and delivered to its consumers. In the ordinary course of events the water would have been carried through the canal and used for irrigation, but a third party, namely Merced Irrigation District, discharged into the canal at various points water from a different source which, according to the findings of the Court of Claims, forced the San Joaquin water out of the canal so as to permit the Merced Irrigation District water to flow down the canal and be beneficially used by the Canal Company. In other words, the Canal Company diverted the water with intent to use it and was only prevented from using it by having water from another source forced upon it and discharged into its canal, thus, according to the findings of the Court of Claims, forcing the San Joaquin River water out of the canal and substituting for it water from a different source.

It is under these facts that it is claimed that the Canal Company forfeited its water rights under a

statute which provides "when the party entitled to the use of water *fails* to beneficially use all or any part of the water claimed by him, for which a right of use is vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and be regarded as unappropriated public water". There is no decision of the Courts of California construing this statute as holding that forfeiture would occur under such circumstances. Under those conditions the Court of Claims held that there was no forfeiture where the water would have been used in the past except for the interference with such use by the Merced Irrigation District, and that the Canal Company intended in the future to use it whenever the Merced Irrigation District ceased to interfere with such use. This was a reasonable interpretation of this piece of legislation. The word *failed* "is applicable only in case of neglect":

Rillito Canal Co. v. Schmidt, 89 Pac. 523, 525, 11 Ariz. 49;

Buffalo County v. Phelps County, 261 N.W. 360, 129 Neb. 268.

Where failure was due to death this is not a "failure" within the meaning of the law:

Muenster v. Tremont Nat. Bank, 49 S.W. 362, 363, 92 Tex. 402.

"Fails" implies delinquency as well as non-action:

Stallings v. Thomas, 18 S.W. 184, 55 Ark. 326.

"Fail" means negligence or refusal:

Walker v. Sheffield Steel Corporation, 27 S.W. (2d) 44, 48, 224 Mo. App. 849.

See also:

Worthington Pump & Machinery Co. v. City of Cudahy, 195 N.W. 717, 182 Wis. 8;

Chesapeake & Ohio R.R. Co. v. Com., 84 S.W. 566, 119 Ky. 519;

Howell v. Lamberson, 231 S.W. 872, 149 Ark. 183.

Petitioner claims that there is no decision of the Courts of California upholding the decision of the Court of Claims. This may be admitted because no case has ever been before the courts of California involving the facts involved in this case. A decision that mere storage without beneficial use is not in itself a beneficial use does not extend to the facts in this case where the Company diverted the water for beneficial use and was in the process of applying it to beneficial use at the time involved here and was interfered with. Nor did the *Turner*[1] case involve the facts here existing. In that case the Court determined that a certain amount of water was beneficially used and that the balance of the water was wasted, without use, out of the canal and into intersecting sloughs. There was no claim that the company carried the water in the canal with any intent to use it or that it would have used it if it had not been interfered with. The same is

[1] *Turner v. East Side Canal & Irrigation Co.*, 169 Cal. 652, 147 Pac. 579.

true in regard to the *Hawkins*[2] case, which was simply a case of lack of beneficial use.

In the case of a public service water company, water held as a reserve or emergency supply is applied to a beneficial purpose.

Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 210, 110 Pac. 927.

Such an appropriator is permitted to take an amount sufficient to meet a reasonably anticipated demand.

Lindblom v. Round Valley Water Co., 178 Cal. 450, 457, 173 Pac. 994.

When the demand is certain and represented by contractual obligations general customs of business prudence would require a reasonable reserve of water to ensure against the loss of a purely fortuitous supply. Water thus taken in good faith is put to beneficial use.

Tulare Dist. v. Lindsay-Strathmore Dist., 3 C. (2d) 489, 547, 45 P. (2d) 1041.

This is particularly true where the restraint of the water serves as a degree of protection against damage by flood and as a means of equalizing and stabilizing the flow and there is no conflict of equities between contesting users.

Meridian Ltd. v. San Francisco, 13 C. (2d) 424, 449, 90 P. (2d) 537.

We respectfully submit that it is not shown that the decision of the Court of Claims is contrary to any decision of the Courts of California or any Federal

---

[2]*Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453.

Court, that the decision was just and that the case depends on extraordinary facts and does not present any important question of general interest; and that, therefore, the Writ should be denied.

Dated, San Francisco, California,
March 27, 1950.

Respectfully submitted,
EDWARD F. TREADWELL,
Attorney for Respondents.